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DISTINCT SOCIETY: ORIGINS, INTERPRETATIONS, IMPLICATIONS

Brian O'Neal
Political and Social Affairs Division

December 1995



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DISTINCT SOCIETY: ORIGINS, INTERPRETATIONS, IMPLICATIONS

INTRODUCTION

On 27 November 1995, Prime Minister Jean Chrétien announced that his government would be tabling a motion in the House of Commons that would, if adopted, express the House's recognition that Quebec is a distinct society within Canada. This proposal was part of a set of measures intended to fulfill certain undertakings made by the Prime Minister during the last phase of the referendum campaign in Quebec.⁽¹⁾

Of these proposed measures, the formal recognition of Quebec as a distinct society is among the most controversial. As recently as October 1992, Canadians were asked to approve placing such a recognition in the Constitution as part of a larger package of reforms. The proposed reforms -- the Charlottetown Accord -- were soundly defeated in a national referendum. In the wake of this rejection, most Canadians turned away from the concept of "mega-constitutional" reform. They also turned away from many of the individual elements contained in the Accord, including the suggestion that Quebec receive constitutional recognition of its distinct character.⁽²⁾ Thus many expressed surprise when this proposal resurfaced, albeit in an extra-constitutional form.

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- (1) Other parts of the package include proposed legislation that will require the federal government not to proceed with any constitutional amendment against the objections of Quebec, Ontario, the western provinces, the Atlantic region or British Columbia (an effort to give Quebec a veto over changes to the Constitution), and a proposal to give the provinces control over job-training programs (but not the funding associated with them).
 - (2) Opinion surveys demonstrate that a majority of Canadians outside Quebec felt that the changes in the Accord would have given the province too much power while a majority of Quebecers felt that they would have given too little. While the distinct society proposal was not specifically referenced in either of these assessments, the form proposed for constitutional recognition of Quebec's distinctiveness would have acknowledged the role of the province's government and legislature in preserving and promoting that distinctiveness.



Much of the controversy surrounding the term "distinct society" arises from confusion over its meaning and its implications. This paper attempts to provide the reader with some sense of where the concept of Quebec as a distinct society originated. Since some have argued that this view pre-dated Confederation, the paper takes that period of Canadian history as its starting point. It then will describe the evolution of the concept of a distinct society and its subsequent emergence in two projects to amend the Constitution -- the Meech Lake Accord, and the Charlottetown Accord -- and finally, in the proposal presented by Prime Minister Chrétien in November 1995. The debate over the meaning and implications of the term distinct society was at its most intense during the time of the Meech Lake Accord. This paper argues, in part, that the limits of this debate and the understandings it generated have coloured all subsequent debate and understanding of the issue. Thus the section on Meech Lake will be the only one to dwell on interpretations and implications.

ORIGINS

A. Pre-Confederation

The idea that Quebec exhibited certain distinct characteristics that needed to be specified in law first emerged in the period following the British conquest in 1760. The British chose to govern the former French colony with as little change to existing arrangements as possible. The Royal Proclamation of 1763 established English common law for new settlers but French civil law remained in force for the French-speaking inhabitants. In 1764, the colony reverted to civil rule and the first two British governors (James Murray and Sir Guy Carleton) interpreted the Royal Proclamation in ways that preserved the French character of the colony. The seigneurial land system was permitted to operate while British settlers were given land under a freehold arrangement. The Catholic Church was not interfered with and continued to collect tithes. Thus, from its earliest days, two societies co-existed in the British colony of Quebec. One was French-speaking and was governed by civil law, a seigneurial land system, and the Catholic Church; the other was English-speaking and Protestant and was governed by a different set of laws.

In 1774, these arrangements were codified in law by an Act of the British Parliament. The *Quebec Act* of 1774 granted the free exercise of the Roman Catholic religion, including the right of the Church to collect tithes; recognized the seigneurial system; and established that civil suits would be tried under French civil law and criminal cases would be tried under British common law. The Act also provided for an appointed legislative council that would include both French- and English-speaking members. In an important break with British practice at the time, a special oath was created in order to allow French-speaking Catholics to sit on this council.

Over time, however, tensions built up between the French and the English in the colony, tensions that the British attempted to solve by dividing Quebec into the provinces of Upper and Lower Canada through the *Constitutional Act* of 1791. Under the terms of the Act, Upper Canada was given freehold land tenure and common law while in Lower Canada the seigneurial system and French civil law were retained and the Catholic Church also kept its status.

Collectively, the Royal Proclamation as enforced by the colony's first British governors, the *Quebec Act*, and the *Constitutional Act* of 1791 can be said to have provided, in a formal sense, for the legal recognition of the distinctive nature of Quebec. It has also been suggested that the pattern established by these Acts inspired the demands presented by francophone representatives when the terms of the *British North America Act* were being formulated.⁽³⁾

B. Confederation

Many have argued that, rather than being a recent idea, the proposal to accord Quebec's distinctiveness some form of constitutional recognition is as old as Confederation itself. The views of historian Ramsay Cook are representative of this assertion. Cook wrote that "the idea that the distinctiveness of Quebec should be recognized constitutionally is far from new." He went to say:

the very act of creating that province in 1867 was, implicitly, a recognition of distinctiveness. But the British North America Act

(3) See, for example, André Burelle, *Le mal canadien*, Fides, Montreal, 1995, p. 67.

also included several explicit recognitions of that fact. For example, Section 94 recognized the civil law of Quebec as distinct and, if the intent expressed in that provision had been fulfilled ("uniformity of all and any laws relative to Property and Civil Rights" in all provinces except Quebec), Quebec would have had a "special status" in that area. In addition the special character of Quebec was recognized in Section 133 which not only made French, for the first time, an official language of Canada, but also made Quebec alone among the original provinces, bilingual. In this, and in some other ways, Quebec has never been a province exactly like the others, for its historic characteristics made some constitutional variations desirable.⁽⁴⁾

Apart from this reading of the contents of the BNA Act itself, the concept of Quebec as a distinct society also has its roots in the very different interpretation given by many Quebecers to Confederation itself. This interpretation argues that the Canadian federation is based on a pact between two peoples, rather than on just an agreement of the provinces that formed the country in 1867 (the interpretation that predominates outside Quebec). Indeed, the former view is the one held by Quebec's former Minister of Canadian Intergovernmental Affairs and one of the first to propose constitutional recognition of Quebec's distinctiveness, Gil Rémillard. In an early essay, Rémillard asserted that Lower Canada's delegates (who, he writes, represented the interests of the French-Canadian people) to the conferences that laid the foundation for Confederation agreed to a union with the other provinces on condition that it be a federation and that

Within this federation they would be recognized as a distinct group with the same rights as the anglophones in the other provinces. (translation)⁽⁵⁾

Rémillard concluded that this recognition was granted by the terms of the *British North America Act* (in accordance with similar views held by Ramsay Cook, above) and writes that French Canadians saw the Act as "a constitutional treaty that would permit them to assert themselves as a distinct people on an equal footing with the anglophone majority

(4) Ramsay Cook, "Alice in Meachland [sic] or the Concept of Quebec as a 'Distinct Society'," in Michael D. Behiels, editor, *The Meech Lake Primer*, University of Ottawa Press, Ottawa, 1989, p. 149-150.

(5) Gil Rémillard, *Le Fédéralisme Canadien*, Québec/Amérique, Montréal, 1980, p. 112, (emphasis added).

(translation).”(6) If one holds this view, it is logical to argue that Quebec, as the only province where one of these two peoples now forms a majority, has always constituted a distinct society within the federation and is worthy of constitutional recognition as such.

C. The Quiet Revolution

The period of Quebec's history known as the "Quiet Revolution" began in 1960 with the election of a Liberal government headed by Jean Lesage. It was during this period that Quebec developed a modern state apparatus and a growing middle class made up of secular professionals began to assert itself. These developments involved an intense self-examination on the part of Quebec's francophone society coupled with a growing demand for greater control over the province's internal affairs. This was the period during which the philosophy of "maîtres chez nous" animated the province; inevitably this philosophy led Quebecers to question the province's role within Confederation.

It is notable that, as premier, Jean Lesage, expressed the belief that his province was a distinct society. Describing the principles that guided his government, for example, he wrote that

Our province has particular traits, its own character, which it is its duty to protect and which it has the right to develop.
(translation)⁽⁷⁾

According to Lesage, he had spoken of Quebec's distinctiveness on numerous occasions and even the Canadian prime minister recognized this principle.

PRE-PATRIATION APPROACHES TO THE DISTINCT SOCIETY

A. The Royal Commission on Bilingualism and Biculturalism

The 1960s witnessed growing unease within Quebec over perceived threats to the French language and Québécois culture and to Quebec's ability to participate in federal decision-making. In response to these concerns, the federal government established, in 1963, the Royal Commission on Bilingualism and Biculturalism, known as the Laurendeau-Dunton Commission after its co-chairmen.

(6) *Ibid.*, p. 114-115.

(7) Jean Lesage, *Un Québec fort dans une nouvelle Confédération*, Quebec, 1965, p. 28 - 29.

The very title of the Commission and its general purpose -- to find ways of ensuring wider recognition of Canada's cultural dualism -- reflected the perception that Canada was made up of two distinct cultures or societies. In conducting their inquiry and writing their reports, the Commissioners were guided by the principle of "equal partnership," the notion that anglophones and francophones should have equal access to participation in the institutions whose decisions affected their lives.⁽⁸⁾ Perhaps as a consequence of this fundamental perception, the Commission determined that the basic conflict in Canada was not between a majority and a minority, but between two majorities: the English-speaking majority outside Quebec and the French-speaking majority inside Quebec.⁽⁹⁾

The work of the Royal Commission marks the time that the concept of a "distinct society" first entered into Canada's political and constitutional dialogue.⁽¹⁰⁾ The Commissioners used the term "distinct society" in their preliminary report, published on 1 February 1965. Although the authors of the report did not make any specific recommendations in this regard, they spoke of a population inspired by a "common culture" that "lives as a homogeneous group according to common standards and rules of conduct," and "has aspirations which are its own, and ...institutions [that] enable it to fulfill them to a greater or lesser degree." This, the commissioners stated, was "the way the French-speaking population of Quebec appeared to us."⁽¹¹⁾ The report then named the institutions through which the francophone majority in Quebec expresses its distinctiveness: legal institutions using Quebec's own Civil Code, political institutions, an educational system "different from that of the other provinces," communications media that operate exclusively in the French language, an autonomous network of social institutions (such as hospitals, trade unions, and voluntary associations), and economic institutions (such as caisses populaires and Hydro-Québec). Lastly, they observed that Quebec was "not only distinct, but ... its individual members ... lead a life quite separate from that of English-speaking Canada," a condition which they described as "a separation in fact."⁽¹²⁾

(8) The Commission also examined the contributions and needs of "other ethnic groups."

(9) John Saywell, "Parliament and Politics: La Révolution tranquille," in *Canadian Annual Review for 1965*, University of Toronto Press, Toronto, 1966, p.44.

(10) This point is acknowledged by most observers. See, for example, José Woehrling, "A Critique of the Distinct Society's Critics," in Behiels (1989), p. 174.

(11) Royal Commission on Bilingualism and Biculturalism, *Preliminary Report*, Ottawa, 1965, p. 111.

(12) *Ibid.*, p. 113.

B. The Special Joint Committee of the Senate and House of Commons on the Constitution: Minority Report, 1972

Following a federal-provincial conference in 1968, the federal government agreed to conduct a comprehensive review of the Constitution. As part of that review, a Special Joint Committee of the Senate and the House of Commons was established in February 1972 to examine federal government proposals related to constitutional change. On 16 March 1972, the Joint Committee tabled its final report to the House of Commons. Two members of the committee, MPs Pierre De Bané (now Senator De Bané) and Martial Asselin, however, felt they could not endorse the report, which they believed did not deal directly and honestly with the constitutional problems facing Quebec and Canada as a whole. Instead, they chose to release a minority report that addressed the issues of concern to them. Stating that Quebec forms a distinct society, they were among the first to argue that this distinctiveness should be given explicit recognition in Canada's Constitution. De Bané and Asselin wrote

Nevertheless - and we are deeply convinced of this fact - Quebec's society forms a distinct entity, and one which is gradually realizing that it cannot achieve its fullest development without a freedom for action and the presence of certain psychological conditions which it lacks at the present time.⁽¹³⁾

Discussing the shortcomings of Canada's Constitution vis-à-vis the aspirations of Quebec, the two Members of Parliament asserted that the Constitution

... is entirely unsuited to this role, being antiquated in both form and content. Most serious of all, nowhere does it recognize the existence of a distinct Quebec society, a shortcoming which has very real consequences...⁽¹⁴⁾

Thus their first recommendation, "that the preamble to the Constitution, in addition to its normal content, should include explicit recognition of the existence and

(13) Pierre De Bané and Martial Asselin, Special Joint Committee of the Senate and of the House of Commons on the Constitution, *A Minority Report*, Ottawa, 7 March 1972, p. 8.

(14) *Ibid.*, p. 10.

aspirations of Quebec society.”⁽¹⁵⁾ Such a preamble, according to De Bané and Asselin, should serve as a guide to future interpretation of the content of the Constitution. Other provinces might have legitimate claim to distinctiveness, they noted, but Quebec’s distinctiveness was more pronounced because “in Quebec we find a nation, in the sociological sense of the word.”⁽¹⁶⁾

This recommendation by De Bané and Asselin drew no official response (it is clear that their colleagues on the Joint Committee did not endorse it). After debate, the House refused consent to table the minority report.⁽¹⁷⁾ The report remains important, however, in that it included one of the first of the suggestions that Quebec’s distinctiveness be explicitly spelt out in the Constitution.

C. The Task Force on National Unity

In 1976, Quebecers for the first time elected a pro-sovereignty political party -- the Parti Québécois led by René Lévesque -- to form their provincial government. In response, the federal government established a task force in 1977 to study national unity and generate proposals to strengthen it. The task force was led by the former premier of Ontario, John Robarts, and Jean-Luc Pepin, a former federal Liberal cabinet minister. The task force was guided by roughly the same principle of Canadian duality that had served the Laurendeau-Dunton Commission before it -- in the judgment of the task force members, the foremost challenge facing Canada was “to create an environment in which duality might flourish.”⁽¹⁸⁾

When the task force reported its conclusions and recommendations in January 1979, it spoke of amending the Constitution in order to address the desires of the francophone majority in Quebec. The authors of the report argued that one of three major objectives of constitutional revision should be:

(15) *Ibid.*, p. 13.

(16) *Ibid.*, p. 6.

(17) Although the reasons for this refusal were largely procedural, one analyst (Jean-Louis Roy, *Le choix d'un pays*, Leméac, Montreal, 1978, p. 289) implies that the authors’ support for recognizing Quebec’s distinctiveness within Canada explained, in part, the reluctance of the House.

(18) Cited in Frederick J. Fletcher and Donald C. Wallace, “Parliament and Politics,” in R.B. Byers (editor), *Canadian Annual Review 1979*, University of Toronto Press, Toronto, 1981, p. 85.

to provide the majority of Québécois with an acceptable federalist response to their desire to maintain their distinctive cultural and social identity and to their deep-rooted grievance that our political institutions do not adequately reflect the dualistic character of Canada."⁽¹⁹⁾

They went on to say that they believed the government of Quebec to have a special role to play regarding that province's special identity and that Quebec should be accorded special status:

the distinctive role of the Quebec government as the single province containing a French-speaking majority must be recognized. ... in the years since 1867 we have learned to live with the fact that Quebec has a considerable degree of what we think should be labelled a distinct status: in its civil law, in the recognition of French as an official language, and in the fact that three of the nine judges of the Supreme Court must come from that province.

Finally, the authors of the report spelled out their views in the clearest terms possible. "Let us put our conviction strongly," they wrote,

Quebec is distinctive and should, within a viable Canada, have the powers necessary to protect and develop its distinctive character; any political solution short of this would lead to the rupture of Canada.⁽²⁰⁾

The Task Force conceived of two ways for Quebec to achieve these powers. The first consisted of giving Quebec, and Quebec alone, formal law-making powers over culture, language, immigration, social policy, communications, and some aspects of foreign affairs. The second approach, the one favoured by task force members, was to give the powers needed by Quebec to all provinces: the provinces could then either exercise these powers or reassign them back to Ottawa.

The Task Force also argued that Quebec's distinctiveness should be given formal constitutional recognition, recommending that

(19) The Task Force on National Unity, *A Future Together: Observations and Recommendations*, January 1979, p. 81.

(20) *Ibid.*, p. 87.

28. The preamble to the constitution should include a declaration that the people of Canada
- ii - recognize the historic partnership between English and French-speaking Canadians, and the distinctiveness of Quebec.

The report received a mixed response; the French-language media in Quebec were generally in favour of its recommendations, while the English-language media were generally against them. Premier Lévesque indicated that, if implemented, the report would encourage Quebec's demands for greater powers. "You get some sort of semi-special status," he told the *Globe and Mail*, "-- watch the appetite grow."⁽²¹⁾

Although the report and recommendations were the subject of extensive discussion, they were ultimately to have little influence over the agreement to patriate the Constitution reached by the federal government and nine other provinces in 1981.

D. The 1980 Quebec Referendum and Patriation of the Constitution

In February 1980, after less than a year in opposition, the federal Liberal Party returned to power with Pierre Trudeau as leader. Shortly afterward, Premier Lévesque announced that a referendum would be held seeking permission for his government to negotiate sovereignty-association with the rest of Canada. The negotiations proposed by Lévesque were to be based on a set of proposals elaborated by the Parti Québécois in a White Paper issued in November 1979.

In January 1980, the Liberal Party of Quebec, under the leadership of Claude Ryan, had released its own set of constitutional proposals in response to the PQ's White Paper. In the document, entitled *A New Canadian Federation*, the Liberals repeated a central theme of the Pepin-Robarts Task Force: that Quebec forms a distinct society within Canada. This premise was stated in the foreword to the paper, under the heading "Quebec -- A distinct society." Party planners stated that:

Quebec forms within the Canadian federation a society which is distinct in terms of its languages, its culture, its institutions and its way of life....Within the Canadian political family, Quebec society has all the characteristics of a distinct national community.⁽²²⁾

(21) Cited in Fletcher and Wallace (1981), p. 87.

(22) The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*, January 1980, p. 13.

The first chapter dealt with the objectives of constitutional reform, and stated that Quebec's distinctiveness ought to be recognized in an amended Constitution. The authors wrote that any new constitution must "affirm the fundamental equality of the two founding peoples." This "basic dualism" could be realized "by the granting to Quebec of guarantees capable of facilitating the protection and the affirmation of its distinct personality." These guarantees, it was added, "should not be narrowly confined to cultural policy."⁽²³⁾

On 20 May 1980, the Parti Québécois referendum proposal was rejected by approximately 60% of those who cast ballots. By late 1981, the federal government and all provincial premiers, with the exception of Quebec's, reached agreement on patriating the Constitution. Quebec's National Assembly had on 1 December 1981 adopted a resolution rejecting the patriation package. In part, the resolution stated that patriation was not acceptable unless it included a recognition

that Quebec, by virtue of its language, culture and institutions, forms a distinct society within the Canadian federal system and has all the attributes of a distinct national community.⁽²⁴⁾

Quebec's Liberal Party also found that it could not support the *Constitution Act, 1982*, a position it maintained when it subsequently held power between 1985 and 1994.⁽²⁵⁾ The Constitution, as patriated, did not reflect the changes proposed by the Liberal Party of Quebec; as one observer noted, the 1982 *Constitution Act*:

made no serious overtures in the direction of enhancing the powers of the Quebec government, and thus of Quebecers as a political collectivity, or of recognizing Quebec as a distinct society or as the homeland of the French-speaking people of Canada.⁽²⁶⁾

(23) *Ibid.*, p. 22.

(24) Quebec, *Votes and Procedures of the National Assembly of Québec*, 1 December 1981, p. 136.

(25) See, for example, Claude Ryan, "Le parti libéral du Québec et la loi de 1982," *Cité libre*, vol. XXII, No. 5 (September-October 1995), p. 7-10. Ryan states that the Party's primary objections were to changes in the balance of power between federal and provincial governments, limits imposed by the Charter on the powers of the National Assembly, and the amending formulas contained in the new Constitution; the absence of a specific recognition of Quebec's distinct nature is not mentioned.

(26) Alan C. Cairns, "Passing Judgement on Meech Lake," in Douglas E. Williams, editor, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, McClelland and Stewart, Toronto, 1991, p. 233.

POST-PATRIATION APPROACHES TO THE DISTINCT SOCIETY

Two major political events, in 1984 and 1985, created an opportunity to amend the Constitution in the direction advocated by Quebec's Liberal Party. At the national level, the federal Liberals who adhered to Pierre Trudeau's vision of the Constitution, were defeated in the 1984 general election. They were replaced in office by the Conservative Party led by Brian Mulroney, -an anglophone Quebecker- sympathetic to the aspirations of his province's moderate nationalists and anxious, in his words, to bring Quebec into the Constitution "with honour and enthusiasm." The following year, a provincial election in Quebec produced a result that made this reconciliation possible, as the Parti Québécois government was replaced by the Liberals under Robert Bourassa. Bourassa's Liberals came to office with a carefully developed set of proposals to amend the Constitution so as to render it acceptable to Quebec.

In February 1985, Gil Rémillard, who was at the time a constitutional adviser to Prime Minister Mulroney and who was later to become the Liberal government's Minister responsible for Canadian Intergovernmental Affairs, published a series of articles in *Le Devoir* in which he outlined the conditions that needed to be met to gain Quebec's acceptance of the 1982 Constitution.⁽²⁷⁾ Rémillard wrote that the "Quebec people's specificity" should be formally recognized in a preamble to an amended Constitution. "This preamble," he indicated, "[could] serve as a reference for the interpretation of the 1867 Constitution Act and all its amendments, including the 1982 Constitution Act."

At the same time, in anticipation of an upcoming provincial election, the policy committee of the Liberal Party of Quebec released a paper in which Rémillard's points were expressed as the formal position of the Party. In *Mastering Our Future*, the Party spoke of its goal of constitutional reform, which stemmed from the "need to obtain express recognition of Quebec as a distinct society,"⁽²⁸⁾ and committed itself to obtaining a constitutional agreement that would "restore Quebec to its proper place in the Canadian federation." Among the three objectives of these negotiations would be the "[e]xplicit recognition of Quebec as a distinct society." "It is high time," the Party argued,

(27) "Under What Conditions Could Quebec Sign the Constitution Act of 1982?" *Le Devoir*, 26-28 February, 1985. Source: Michael D. Behiels, editor, *Quebec Since 1945: Selected Readings*, Copp Clark Pittman Ltd, Toronto, 1987, p. 209-220.

(28) The Liberal Party of Quebec, *Mastering Our Future*, February 1985, p. 43.

that Quebec be given explicit constitutional recognition as a distinct society, with its own language, culture, history, institutions and way of life. Without this recognition, and the accompanying political rights and responsibilities, it will always be difficult to agree on the numerous questions involving Quebec's place in Canada. This recognition should be formally expressed in a preamble of the new Constitution.⁽²⁹⁾

In May 1985, the Parti Québécois, which was still in power, released proposals of its own for amending the Constitution and indicating that the Constitution would be accepted by Quebec only if an agreement was reached with the rest of Canada that, among other things, recognized "the distinctiveness of our people."⁽³⁰⁾ The government's first of a total of 22 proposals stated that:

The Pepin-Robarts Commission recommended not only that the distinctiveness of Québec be recognized, but also that Québec be permitted to determine its official language and that it be granted the necessary powers to assume its particular responsibility with respect to the French heritage within its own territory.⁽³¹⁾

The paper argued that "an essential prerequisite" to Quebec's participation in a new constitution was recognition of "the existence of a people of Quebec."⁽³²⁾ Thus, while the two main political parties in Quebec may have been far apart on the steps needed to secure Quebec's adherence to the 1982 Constitution, they agreed that formal recognition of Quebec's distinct nature was a fundamental prerequisite.

The Liberal Party was victorious in the December 1985 election. The use of *Mastering Our Future* as the basis of the party's electoral platform enabled the Liberal government to claim that it had received a mandate from Quebec's electorate to proceed with its constitutional proposals.⁽³³⁾ In a speech delivered in Mount-Gabriel, Quebec, in May 1986, Gil Rémillard, now Minister responsible for Canadian Intergovernmental Affairs, spelled out

(29) *Ibid.*, p. 47.

(30) Government of Quebec *Draft Agreement on the Constitution: Proposals by the Government of Quebec*, May 1985, p. 5 (official translation of government text).

(31) *Ibid.*, p. 11.

(32) *Ibid.*

(33) See, for example, Gil Rémillard, *Débats de l'Assemblée nationale*, 19 June 1987, p. 8780.

the five conditions that must be met before Quebec could support the Constitution. The first condition was the explicit recognition of Quebec as a distinct society.⁽³⁴⁾ Rémillard elaborated this point, telling his audience that

The recognition of the distinctiveness of Quebec is for us an essential precondition to any negotiation that might lead to Quebec's endorsement of the Constitution Act of 1982.

This identity cannot in any way be challenged. We must be assured that the Canadian Constitution will recognize the special nature of Quebec society and guarantee us the means necessary to ensure its full realization within the framework of Canadian federalism. (translation)⁽³⁵⁾

A. The Constitution Amendment, 1987⁽³⁶⁾

The events leading up to the drafting of the Meech Lake Accord and its eventual failure have received extensive coverage and will not be discussed here.⁽³⁷⁾ Of interest to the present discussion is the form in which the distinct society provisions in the Accord emerged from the constitutional demands of Quebec.

Following their meeting on 30 April 1987 at Meech Lake, the Prime Minister and the ten premiers issued a communiqué containing an agreement in principle to introduce amendments to the Constitution intended to "allow Quebec to resume its place as a full participant in Canada's constitutional development."

The first area of proposed change dealt with Quebec's distinct society. The Constitution was to be interpreted in light of a "fundamental characteristic of Canada": the existence of francophones as a majority in Quebec (but present elsewhere in the country) and

(34) Gil Rémillard, "Quebec's Quest for Survival and Equality Via the Meech Lake Accord," in Behiels (1989), p. 29.

(35) *Le Québec et le lac Meech, Un dossier du Devoir*, Guérin Littérature, Montreal, 1987, p.57.

(36) For a more detailed discussion from a legal perspective, please see Mollie Dunsmuir, *Constitutional Activity from Patriation to Charlottetown (1980-1992)*, Research Branch, Library of Parliament, November 1995, especially p. 10 - 13.

(37) See, for example, Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord*, Douglas and McIntyre, Vancouver, 1990 and Patrick J. Monahan, *Meech Lake: The Inside Story*, University of Toronto Press, 1991, for two different perspectives on the Accord and the reasons for its demise.

existence of francophones as a majority in Quebec (but present elsewhere in the country) and the existence of an anglophone majority in the rest of the country (but with anglophones also present in Quebec). The Constitution was also to be interpreted in a manner consistent with "the recognition that Quebec constitutes within Canada a distinct society." The federal parliament and provincial legislatures were to be committed to preserving the fundamental characteristic of Canada, as described, while the roles of the government and legislature of Quebec to "preserve and promote" Quebec's distinct identity were to be affirmed.

On 3 June 1987, the first ministers met again to sign the constitutional accord, now transformed into a legal text. This text specified that the proposed amendments dealing with Quebec's distinctiveness were to be placed in the body of the Constitution in the form of a new section 2. The wording of the text differed little from that of the April communiqué, except for an additional clause asserting that nothing in the new section would impair the powers and privileges of the provincial and federal governments or legislatures.

The proposals in the Accord differed in two main respects from those of the Liberal Party of Quebec and Gil Rémillard. In contrast to the Quebec Liberals' suggestion that Quebec's distinctiveness be recognized in a preamble to the Constitution, the Constitutional Amendment, 1987 called for this recognition to be placed in the body of the Constitution, after section 1. Secondly, while the Liberals had generally defined Quebec's distinctiveness in terms of its language, culture, laws, and institutions, the Accord left the term undefined. However, the Accord responded to Quebec's requirements by proposing that the Constitution be amended to affirm that the role of legislature and government of Quebec was to preserve and promote the distinct identity of that province. This proposal appears to have been in response to Rémillard's observation that the Constitution had to guarantee Quebec the means necessary to ensure its full development within the federation (see above).

In the national debate that followed the signing of the Accord, opponents of the proposal voiced several criticisms of what became known as the "distinct society clause." There were those who feared that a provision of this sort would seriously weaken the *Canadian Charter of Rights and Freedoms*. Others argued that it would threaten the rights and freedoms of francophones living outside Quebec and of aboriginals, women, and ethnic and cultural minorities inside the province.⁽³⁸⁾ Representatives of francophone minority

(38) Woehrling (1989), p. 161-207 provides a good summary of these criticisms and responds to them.

communities worried about the absence, in the clause, of any obligation on the federal government to promote the duality of Canada.⁽³⁹⁾ Some women's groups outside Quebec doubted that the Supreme Court would protect equality rights from the possible impact of the clause.⁽⁴⁰⁾ For their part, ethnic communities criticized the absence of a reference to multicultural diversity as being characteristic of Quebec (as well as of Canada).⁽⁴¹⁾ Collectively, these objections also reflected a recently developed awareness that Canada, as it is known and understood today, is a nation built by the efforts of many peoples; the "distinct society" clause failed to accommodate this awareness. In the words of Peter H. Russell:

[a]s the distinct society clause was translated into the symbolic terms of constitutional politics, it encroached on tender feelings of status. By giving constitutional recognition in the defining features of Canada to Quebec, the English, and the French, the clause was seen by many who did not fit into any of its categories as a put-down denying their fundamental importance to Canada.⁽⁴²⁾

More generally, however, opponents drew attention to the ambiguity surrounding the term itself, arguing that potentially it gave Quebec a considerable degree of unspecified power. Some, like former prime minister Pierre Trudeau, worried about the possible implications of recognizing Quebec's distinctiveness within the body of the Constitution. Trudeau argued that

particularly after constitutionalists have been discussing preambles for a long period of time, when you deliberately do not put "distinct society" into a preamble, but into an interpretive clause, that can mean only one thing --- you are giving to the government of that distinct society powers that it did not have before.⁽⁴³⁾

(39) See, for example, Georges Arès, "The Accord Abandons Canada's Minorities," in Behiels (1989), p. 219-224.

(40) See for example, Mary Eberts, "Why are Women Being Ignored?" in Behiels (1989) p. 302-320.

(41) See, for example, Canadian Ethnocultural Council, "A Dream Deferred," in Behiels (1989) p. 340.

(42) Peter H. Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?* University of Toronto Press, Toronto, 1992, p. 143.

(43) The Rt. Hon. Pierre Trudeau, "Who Speaks for Canada?" in Behiels (1989), p. 81.

A more moderate assessment came from Marjorie Bowker, who analyzed the Meech Lake Accord in order to make it comprehensible to average Canadians. She concluded that the distinct society clause restated a recognition that was already contained in the Constitution:

The distinct society clause seems to be nothing more than a recognition of an established and historical fact. Quebec is indeed different in respect to its laws, its language and its culture.⁽⁴⁴⁾

However, she, too, was disturbed by the lack of definition of what distinct society meant, especially since Quebec's government was to be given the power to "preserve and promote" that distinctiveness. She also worried that some future government in Quebec might determine that the only way to "preserve and promote" the province's distinctiveness would be through independence. If constitutional recognition of Quebec's distinctiveness were desirable, she argued that it be placed instead in the Preamble of the Accord.

Outside Quebec, supporters of the amendment argued that it provided Quebecers with "a symbolic affirmation for the future."⁽⁴⁵⁾ This view coincided with that expressed by a leading constitutionalist, who wrote that the distinct society clause was "mainly horatory or symbolic."⁽⁴⁶⁾ Supporters denied that the distinct society clause would confer special status on Quebec, in some instances arguing instead that the clause instructed the courts that "governments in Quebec are likely to use their *existing* powers in ways that are different from other provinces."⁽⁴⁷⁾ In his summary of the Accord, Richard Simeon concluded that to its supporters it represented a moderate and limited constitutional response to Quebec's distinct status and that

(44) Marjorie M. Bowker, *The Meech Lake Accord: What It Will Mean to You and to Canada*, Voyageur Publishing, Hull, Quebec, 1990, p. 53.

(45) Canadians for a Unifying Constitution/Friends of Meech Lake, *Meech Lake: Setting the Record Straight*, 1990, p. 8.

(46) Peter W. Hogg, *Meech Lake Constitutional Accord Annotated*, Carswell, Toronto, 1988, p. 13.

(47) *Ibid.*, p. 9. (emphasis in the original).

from a Quebec perspective it [fell] considerably short of the objectives which have been advanced by all modern Quebec governments.⁽⁴⁸⁾

According to Simeon, contrary to the claims made by previous governments in Quebec, its supporters believed that the clause did not imply specific transfers of jurisdiction.⁽⁴⁹⁾ In a retrospective analysis, Simeon determined that the Accord would have provided Quebec with "symbolic reassurance," and that "Meech was more a restatement of the status quo than a radical change."⁽⁵⁰⁾ Other supporters of the Accord denied claims that the clause would undermine rights enshrined in the Charter, or threaten the rights of Quebec's minorities.

Inside Quebec, the debate on the distinct society provisions took on a different tone. Premier Bourassa asserted that the clause had more than just symbolic weight, telling the National Assembly that

With the (recognition of the) distinct society we achieve a major gain which is not merely symbolic, because henceforth the whole Constitution of the country must be interpreted in the light of this recognition. (translation)⁵¹

Furthermore, he argued that the lack of definition of Quebec's distinctiveness in the Accord was deliberate because "we did not wish to define this precisely, in order to avoid reducing the role of the National Assembly in promoting this distinctiveness. (translation)."⁽⁵²⁾ He also implied, contrary to what the Accord's supporters outside Quebec were saying, that the amendment would eventually give more powers to the province, stating that:

It must be emphasized that the Constitution, including the Charter, will be interpreted and implemented in the light of this provision on distinct society. The exercise of legislative powers

(48) Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism," *Canadian Public Policy/Analyse de politiques*, September 1988, p. 12.

(49) *Ibid.*, p. 13.

(50) Richard Simeon, "The Lessons of Meech Lake and Charlottetown," *Canada Watch*, March/April 1995, p. 66.

(51) Quebec, National Assembly, *Debates*, 18 June 1987, p. 8708.

(52) *Ibid.*, p. 8708.

is contemplated and this will allow us to consolidate what we have achieved and to gain ground. (translation)⁽⁵³⁾

Gil Rémillard made a similar observation when he wrote afterward that "the Accord ... avoids designating the particular components of Quebec's specificity so that there is all the leeway required to ensure its protection and development."⁽⁵⁴⁾ During the debate in the National Assembly, he also suggested that Quebec's powers would be enhanced as a result of the changes to be made to the Constitution, arguing that

What we have now, with the recognition of Quebec as a distinct society, is the possibility of using this element of constitutional interpretation ... to show that Radio-Québec is an essential tool for the cultural development of Quebec and ... for arguing that caisses populaires are really within provincial jurisdiction ... to express ourselves very clearly on the international scene with respect to our distinctiveness. (translation)⁽⁵⁵⁾

While the Accord and its distinct society clause did not receive much support from minority groups in Quebec, it is notable that representatives of women's interests in the province argued that the rights of Quebec women would not be threatened as a result of the inclusion of the clause in the Constitution.⁽⁵⁶⁾

Some opponents of the Accord in Quebec, such as the Parti Québécois and the Conseil de la langue française, were critical of the absence of any definition of distinct society. In the National Assembly, the Parti Québécois argued that at best the expression was an empty one, void of any substantial meaning for the province. At worst, it claimed, the amendment would be interpreted by the courts on the basis of the references to linguistic dualism also present in the clause. Were this to be the case, Quebec would be defined as a bilingual entity,

(53) *Ibid.*

(54) Gil Rémillard, "Quebec's Quest for Survival and Equality," in Behiels (1989), p. 32. From an article that first appeared in Réal-A. Forest, ed., *L'Adhésion du Québec à l'Accord du Lac Meech*, Les Éditions Thémis, Montreal, 1988.

(55) Quebec, *Débats de l'Assemblée nationale*, 19 June 1987, p. 8784-8785.

(56) Fédération des femmes du Québec, "Are Women's Rights Threatened by the Distinct Society Clause?" in Behiels (1989), p. 295-301. See also, Nicole Duplé, "L'Accord du Lac Meech: les inquiétudes féministes sont-elles fondées?", Réal A. Forest, ed., *L'Adhésion du Québec à l'Accord du Lac Meech*, les Éditions Thémis, Montreal, 1988, p. 69-75.

thus throwing into jeopardy efforts to build a francophone society. Nevertheless, the party's previous demand that the Constitution recognize Quebec's distinctiveness made criticism of this aspect of the accord generally problematic.

B. The Charlottetown Accord

After the collapse of the Meech Lake Accord, and in the face of an impending referendum in Quebec, the federal government tried once more to amend the Constitution to obtain Quebec's adherence. This attempt, known as the "Canada round," revived many of the proposals contained in the first effort, but placed them within the context of other amendments designed to satisfy others who sought constitutional change.

The distinct society clause in the new accord differed, however, from that found in the Meech Lake Accord. It was placed in an interpretive clause that made reference to a long list of fundamental characteristics of Canada, thereby diminishing, according to the Quebec critics of the new Accord, Quebec's constitutional importance. The Accord also departed significantly from its predecessor in that Quebec's distinctiveness was explicitly defined in terms of language, unique culture and civil law tradition. The role of Quebec's legislature and government in preserving and promoting that distinctiveness was then affirmed.

Critics in Quebec noted that the Accord did not address the province's demands for greater powers and found the distinct society provisions to be insufficient. Daniel Turp, José Woehrling, Daniel Proulx, and other constitutionalists, argued that the distinct society clause as written in the proposed "Canada clause" represented a major setback for Quebec, since the scope of the clause was too narrow and was diminished by being placed in the context of the larger clause.⁽⁵⁷⁾ Outside Quebec, criticism focused on all elements of the new accord, but was muted with respect to its distinct society provisions. The accord was subsequently rejected in a national referendum held in October 1992. (Quebec held its own referendum at the same time using the same wording for the question.) In the aftermath, the consensus among all but a few enthusiasts, was that constitutional renewal efforts would not be seen again in the near future.

(57) This argument was made in the debates in the National Assembly and by Henri Brun, in *Le Québec et le Lac Meech* (1987), p. 153 and by eleven other Quebec constitutional experts, p. 168; others, such as Woehrling, (p. 160-161), were less certain.

C. The 1995 Quebec Referendum and Beyond

Following the demise of the Meech Lake and Charlottetown Accords, the Liberal Party of Quebec continued to adhere to the principles these had espoused. In the lead-up to the September 1994 provincial election, the Quebec Liberal Party indicated its continued attachment to the goals it had announced prior to the Meech Lake Accord. In the document setting out its proposed agenda, should it continue to form the government, the party stated that

these demands [that formed the basis of the Meech Lake and Charlottetown Accords] have no way diminished in importance. So it is not the intention of the QLP to abandon them. What they have in common is a desire to obtain greater autonomy for Québec ... and the affirmation of the distinct character of Québec society.⁽⁵⁸⁾

Nevertheless, the party explicitly ruled out constitutional change as a means of achieving these goals, although it declared that it would be "guided by the traditional demands of Québec."⁽⁵⁹⁾ For its part, the Federal Liberal Party, led by Jean Chrétien, avoided discussion of constitutional change during the 1993 federal general election, preferring instead to discuss economic issues.

The Quebec election of September 1994 was won by the PQ, which declared its intention to hold a referendum on sovereignty as soon as possible. In the aftermath of the close results of the 1995 October referendum in Quebec, political leaders inside and outside the province began to search for ways to address Quebecers' dissatisfaction with the status quo. This search resurrected a key proposal from the Meech Lake and Charlottetown Accords: formal recognition of Quebec as a distinct society, although in an extra-constitutional form. Certain voices inside and outside the province warned that this was a dangerous path that would re-open old wounds. In Quebec, Konrad Yakabuski expressed this sentiment, writing that

In venturing on to this minefield, the political leaders of the rest of Canada are already reawakening the old demons that have

(58) Liberal Party of Quebec, *Taking Action For Québec*, March 1994, p. 45-46.

(59) *Ibid.*, p. 47. The Parti Québécois, for its part, declined to discuss the possibility of obtaining recognition of Quebec's distinctiveness within Canada. Instead, its policy document (*Des idées pour mon pays: Programme du Parti Québécois*) noted that previous efforts to amend the Constitution to accommodate Quebec had failed and proposed sovereignty as the only remedy.

caused the failure of all previous attempts to settle this tormenting question. (translation)⁽⁶⁰⁾

Recent opinion polls have shown that Canadians outside Quebec are wary of recognizing the province's distinctiveness either in the Constitution, or through resolutions in provincial legislatures or the House of Commons.⁽⁶¹⁾ Notwithstanding this reluctance, Prime Minister Jean Chrétien tabled a motion in the House on 28 November 1995 calling for recognition of Quebec as a distinct society and proposing that:

Whereas the People of Quebec have expressed their desire for recognition of Quebec's distinct society;

- 1) the House recognize that Quebec is a distinct society within Canada;
- 2) The House recognize that Quebec's distinct society includes its French-speaking majority, unique culture and civil law tradition;
- 3) the House undertake to be guided by this reality;
- 4) the House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.

This motion quite clearly stands apart from the two previous efforts to grant recognition of Quebec's distinct nature within Canada. To begin with, no amendment of the Constitution is called for. Thus, courts, in their interpretation of the Constitution, will not be called upon to take Quebec's distinctiveness into account. There is also no reference in the motion to the legislature or government of Quebec and their role in either preserving or promoting Quebec's distinct character. Like the Charlottetown Accord, but in contrast to

(60) Konrad Yakabuski, "Société distincte et droit de veto sous perfusion," *Le Devoir*, 8 November 1995.

(61) A poll conducted for the *Globe and Mail* (Toronto) by the Environics Research Group between 3 Nov. and 10 Nov. showed that 58% of Canadians living outside Quebec feel that the Quebec should not be recognized as a distinct society in the Constitution while 55% were opposed to passage of a resolution by Parliament recognizing Quebec's distinctiveness. A bare majority of 51% agreed that Quebec is distinct. The poll questioned 1,208 voters, 902 of whom live outside Quebec. The poll's margin of error was plus or minus 3.3 percentage points, 19 times out of 20.

Meech, the motion defines the features that make Quebec distinct: a French-speaking majority, its "unique" culture, and the use of the civil law in the province's legal system.

Once more, as was the case with Meech and Charlottetown, observers are divided over the implications of such recognition. Most commentators in Quebec argue that it will have little more than symbolic meaning, especially since it does not confer any additional powers upon the National Assembly or Quebec's government. Outside Quebec, opinion is divided, with a majority of those polled voicing their disapproval of any proposal regarding formal recognition of the "distinct society."

CONCLUSION

One of Marjorie Bowker's concluding thoughts is worth repeating. "It is understandable," she wrote, "that the objections now being voiced by some Canadians

could be interpreted by Quebeckers as a form of rejection, whereas in truth there is a genuine desire amongst Canadians to recognize Quebec's distinctiveness. Our history, dating back to the Quebec Act of 1774, has shown a deference to Quebec's special needs. Perhaps this recognition can be achieved in ways less contentious than that attempted in the Meech Lake Accord.⁽⁶²⁾

By adopting the motion proposed by the government, has the House of Commons found a less contentious way of giving Quebec the recognition it has sought for so long while at the same time avoiding the objections to such a move put forward by some outside the province?

Public opinion polls notwithstanding, the cliché that only time will tell is probably the only accurate comment that can be made. It can be observed, however, that formal recognition of Quebec's distinctiveness has always been, in one form or another, a feature of the legal and constitutional arrangements of this country, even before this was officially established. This recognition has never been as explicit as the proposals in the Meech Lake and Charlottetown Accords, but, in a tacit form, it has always been there. Nor is the demand for recognition of Quebec's distinctiveness and for the government and legislature of Quebec to have the powers necessary to reinforce that distinctiveness a recent phenomenon.

(62) Bowker (1990), p. 55-56.

Though perhaps not generally known, this demand has been a key element of constitutional and political discussions over the years. Thus history, recent events, and the positions held by even moderate nationalists in Quebec lead to the conclusion that this demand is unlikely to go away. Whether or not those Quebecers not active in political circles or in social movements will be satisfied with the symbolic recognition afforded to the province by the recent House of Commons motion is a question that only the future can answer. Recent polls, however, show that most Quebecers have responded negatively.⁽⁶³⁾

Many of the groups, both inside and outside Quebec, who objected to the distinct society clause in the Meech Lake Accord have yet to render their verdicts regarding the latest move to recognize Quebec's distinctiveness. One group, however, the Grand Council of the Crees of Quebec, has spoken out in opposition to it. In an appearance before the House of Commons Standing Committee on Justice and Legal Affairs, Grand Chief Mathew Coon Come, spoke out against what he saw as the lack of balance in the terms in which the current resolution is drafted. Furthermore, he expressed misgivings about the use of the term "people" in the resolution, claiming that it lacks clarity and seems to suggest that there is one single people of Quebec.⁽⁶⁴⁾

The attitudes of Canadians outside Quebec have been largely shaped by the debate over the distinct society clause that took place at the time of the Meech Lake Accord. Moreover, many Canadians believe that Charter rights now outweigh provincial rights and rule out the collectivist implications of the concept of distinct societies.⁽⁶⁵⁾ How will they view a recognition of Quebec's distinctiveness that is extra-constitutional, defined, and makes no reference to Quebec's government or legislature or confers new powers upon them? Having formed their initial opinions in a different context, they are unlikely to abandon their objections easily.

(63) The results of a SOM poll published in *La Presse* (8 December 1995) revealed that 53% of Quebecers viewed the government's motion as unsatisfactory. The poll was conducted between 1-5 December among 1,003 Quebecers, and had a margin of error of 3.63%.

(64) House of Commons, Standing Committee on Justice and Legal Affairs, *Proceedings*, 5 December 1995.

(65) Russell (1992), p. 131 and Simeon (1995), p. 65.

